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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 ETALON IMOB S.R.L., ET AL.,

4 Plaintiffs,

5 v.

12 CV 6868 (BSJ) (AJP)

6 LAWRENCE H. SCHOENBACH, ET
7 AL.,

8 Defendants.

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9 New York, N.Y.
10 November 19, 2012
12:35 p.m.

11 Before:

12 HON. ANDREW J. PECK

13 Magistrate Judge

14 APPEARANCES

15 VANDENBERG & FELIU, LLP
Attorneys for Plaintiffs

16 BY: RAYMOND L. VANDENBERG
KATHLEEN GARDNER

17 NATHANIEL B. SMITH
18 Attorney for Defendants

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1 (In open court)

2 THE COURT: Let me note for the record -- and I'm not
3 sure if Mr. Smith has informed plaintiff's counsel -- but he
4 was an associate with me and worked with me when we were both
5 at the Paul, Weiss, Rifkind law firm. He has had two cases in
6 front of me that I can recall since then. I have not recused
7 in those. I don't plan to recuse in this one. But either side
8 can make whatever motion or do whatever they think necessary,
9 if anything, but I do want to have that on the record.

10 All right. I think we have to do two things here
11 today. One is deal with the protective-order-related questions
12 and the other is deal with setting a schedule for discovery in
13 this case and other deadlines.

14 Should we set the schedule first or deal with the
15 protective order issue first?

16 MR. VANDENBERG: Your Honor, Raymond Vandenberg for
17 the plaintiffs.

18 I guess your Honor is aware that there are still
19 motions outstanding, dispositive motions in addition to the
20 protective order.

21 THE COURT: Yes. The dispositive motion is the
22 jurisdictional motion. It is my practice accepting cases that
23 it is clear from the motion are sort of dead, bang, can't lose
24 motions that discovery will go forward.

25 First of all, the motion is a jurisdictional one. So

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1 that if it turns out that there is an issue as to the residence
2 or the citizenship, whatever, of the plaintiff, then there
3 still would have to be discovery. It would just be across the
4 street in state court or whatever.

5 I guess the only other thing I would say is that for
6 both sides you fight about jurisdiction and you're wrong -- I
7 guess if the court rules incorrectly and says there's
8 jurisdiction where there isn't, you waste the fact that you may
9 have done a lot of not only discovery but potentially trial,
10 etc., all of which will then get tossed out by the circuit. So
11 there is something to be said for if you're not sure of the
12 outcome and you want to be safe deciding that you'd rather do
13 the same thing in state court. But to the extent that you want
14 to be here, you're here and you know whatever happens with that
15 motion happens. It is a dispositive motion. So that is before
16 Judge Jones who does not refer dispositive motions.

17 Obviously if you all consent to have the case in front
18 of me for all purposes pursuant to 28 U.S. Code Section 636(c)
19 which requires unanimous consent, then I would deal with the
20 motion, etc.

21 MR. VANDENBERG: We're not prepared to do that, your
22 Honor.

23 But I would suggest that we look at the schedule
24 first. From the plaintiffs' standpoint, we'd like to proceed
25 as rapidly as possible. We have an order of attachment here

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1 which is the first order of business.

2 THE COURT: So hopefully you've each read my chambers
3 rules or operating procedures, whatever they're officially
4 called, and you know you're in a, in essence, rocket docket.

5 How long do you all think you need for discovery?

6 My normal position for a case like this would be to
7 say three months, maybe four months. But you all tell me if
8 you want something greater or lesser.

9 MR. VANDENBERG: From the plaintiffs' point of view
10 we'd like to move it rapidly.

11 My own situation is such that I have a trial in state
12 court across the street in the middle of January which is going
13 to take up a lot of my time between now and then. So I would
14 suggest something sort of towards the middle of April as a
15 termination date for discovery in this case or end of April.

16 THE COURT: That's more like five-and-a-half, six
17 months, not four. And the good news or bad news is when you
18 have a colleague sitting next to you, I assume that that person
19 can cover while you're on trial.

20 Mr. Smith, what's your thoughts?

21 MR. SMITH: I hear what your Honor is saying about
22 wanting to go forward with discovery notwithstanding a
23 dispositive motion. And given plaintiffs' request to put this
24 thing into April, I don't have a problem with that. I
25 understand the court might. So then I think we ought to just

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1 go for four months as a -- as an objective with the
2 understanding that -- I mean don't have an objection,
3 obviously, as a defendant, to allowing Mr. Vandenberg --

4 THE COURT: To six years for discovery.

5 MR. SMITH: -- to harass somebody else during the
6 month of January. But nevertheless -- so that's my position on
7 that.

8 THE COURT: So, discovery cutoff will be March 29.

9 Are we going to have experts -- and that, by the way,
10 is a four, almost four-and-a-half month period.

11 MR. VANDENBERG: I appreciate that, your Honor.

12 THE COURT: That would include experts. So my
13 question is are you going to have experts or do you think you
14 might? And if so, simultaneous reports, sequential? What's
15 your pleasure?

16 MR. VANDENBERG: At the moment, I can't say
17 definitively that we will or won't have experts. I would doubt
18 it based on what I know about the case so far.

19 THE COURT: Mr. Smith.

20 MR. SMITH: I'm not quite sure I agree with
21 plaintiffs' counsel. There are some -- there's likely to be
22 some sophisticated jargon that may require explanation. And I
23 don't know whether or not Mr. Leon, who is the principal
24 defendant, will be able to provide that. And so there is a
25 possibility that an expert would be helpful in this case to

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1 explain some of the practices for delivering international
2 credit facilities and what those terms actually mean, actually,
3 might be an issue.

4 THE COURT: So we'll set the expert reports as
5 follows.

6 February 15 for the plaintiff. And March 1 for the
7 defendant. And if there's a need for rebuttal report, probably
8 be March 8. Whatever. As long as you get everything done by
9 March 29.

10 How soon can you all do mandatory initial disclosures
11 under 26(a)(1)?

12 MR. VANDENBERG: I think we can do that within the
13 next three weeks.

14 THE COURT: December 7 -- I'm sorry.

15 Mr. Smith, does that work for you?

16 MR. SMITH: That's fine, your Honor. Thank you.

17 THE COURT: Are there going to be issues as to
18 electronic disclosure in this case? Is there going to be
19 electronic discovery?

20 MR. VANDENBERG: Well there is electronic discovery
21 insofar as e-mail has been used. I don't see it as being a
22 huge volume. Haven't gotten into it yet.

23 MR. SMITH: I agree with that. There are some
24 e-mails, communications between the principal plaintiff and the
25 principal defendant and some of the players. But I think we

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1 could at least initially agree to produce hard copies. And if
2 there's an issue about the authenticity --

3 THE COURT: Hard copies if there are more than 25 to
4 50 are probably a mistake. But why don't you all talk about
5 it. I think from what you're saying it's mostly stuff going
6 back and forth between the plaintiff and the defendant. So I'm
7 not going to have you fill out the joint electronic discovery
8 submission form. But, you should look at it. It's Exhibit B.
9 It's on the court website as part of my rules package. Look at
10 it. Guide yourself through that. And don't have a train
11 wreck. When you start talking about printing to paper, I start
12 worrying.

13 Next, I'd like to get a protective answer or a without
14 prejudice answer, however you want to put it, from the
15 defendants so that any affirmative defenses or whatever are on
16 the table for discovery. It's obviously without prejudice to
17 the motion to dismiss.

18 How soon can you do that, Mr. Smith?

19 MR. SMITH: Let me just understand what you're saying,
20 your Honor. You want me to file an answer as if I didn't have
21 a motion to dismiss with the understanding that I'm not waiving
22 any rights?

23 THE COURT: Correct.

24 MR. SMITH: Two weeks.

25 THE COURT: December 3.

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1 Is there likely to be any amendment to the pleadings
2 on the plaintiffs' side?

3 MR. VANDENBERG: Not likely.

4 THE COURT: I'm not going to give a date, therefore,
5 for amendments but I don't expect any absent good cause and not
6 too late in the case or you won't be able to do it.

7 Finally, it's my practice to give the parties two
8 paths to go down at the end of discovery so you don't have to
9 do a pretrial order if there is a case dispositive summary
10 judgment motion filed. So by April 1 you will notify me and
11 the district judge as to whether you're moving for summary
12 judgment or not. Comply with any premotion requirements of the
13 district judge.

14 And if there is going to be a summary judgment motion
15 it will be due April 22. If there is no summary judgment
16 motion, pretrial order will be due April 22. If there is a
17 summary judgment motion, the pretrial order is automatically
18 deferred until 30 days after the court rules on the summary
19 judgment motion.

20 That I think takes care of scheduling. Other than to
21 decide when we'll have our next status conference. We'll do
22 that at the end when we see where we are on the protective
23 order motion.

24 My inclination, depending on -- and I don't remember
25 if there is a copy -- do I have a copy of the subpoenas

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1 attached to the moving or opposition papers?

2 MR. VANDENBERG: Your Honor, there were no subpoenas.
3 The protective order motion was made in regard to documents
4 that were produced pursuant to the judge's order in her
5 attachment order.

6 THE COURT: But I thought the issue -- and I will say
7 I read the motion a while ago and then trying to get you all in
8 here because of Sandy and everything else my memory with
9 multiple cases on the docket may be confusing this with another
10 one, but I thought the issue was the ability of a party, to
11 wit, the plaintiff, to use information gathered from here in
12 contacting -- which I took to mean subpoenas -- nonparties. Am
13 I totally misremembering things?

14 MR. SMITH: Not totally, your Honor. There was no
15 subpoena issued but there was, on my client's behalf, a request
16 for protective order which is I think a typically -- I'm not
17 going too far saying this is a pretty standard thing.

18 In this case, Mr. Leon submitted a declaration which
19 said I have some real concerns about Mr. Zinger getting my
20 personal contact information for basically two reasons. One,
21 while I was working to try and get him financing, he was
22 basically snooping and trying to intercede, find out who my
23 banking contacts were over my objection. And then in the runup
24 to the filing of this lawsuit, he threatened to put him out of
25 business. So, those two facts plus the fact that a protective

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1 order -- this type of protective order -- or protective orders
2 generally are often given in this courthouse for business
3 information.

4 THE COURT: Protective order is, obviously, fairly
5 standard. One that prevents subpoenaing somebody is not
6 standard. So, maybe we can just put a pin in this. But I'm
7 not going to sign the thing that says they got to give you ten
8 days notice and five days response and etc., etc., before they
9 can issue a subpoena to a nonparty. And if you want to all put
10 a pin in that and just do a standard protective order, we can
11 do that. If you want me to resolve the matter with finality in
12 the next five to six minutes because I've got a 1:00 committee
13 meeting, we can do that as well.

14 What's your pleasure?

15 For example, if you reveal some information and they
16 think it's related to assets or other things that go to the
17 attachment issue, etc., and they want to serve a subpoena, I
18 might well allow that. If they want to send a letter saying
19 you should be aware that Mr. Leon is a crook, etc., etc., I'm
20 probably not going to allow that.

21 So what's your pleasure? You're the movant,
22 Mr. Smith.

23 MR. SMITH: Well my pleasure would be for the court to
24 sign the protective order as --

25 THE COURT: That ship has passed.

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1 MR. SMITH: Well then the limitation that the court
2 has suggested makes sense given that the other ship has left
3 the harbor.

4 I need some sort of protection because -- and maybe
5 that's the right way to handle it, is that if they can identify
6 certain assets in New York that could be subject to attachment
7 and they're pursuing that for that purpose, then I don't really
8 have a very good argument. But if they're sending subpoenas or
9 letters and attaching copies of complaints and saying you
10 know -- ostensibly we have a request for information but really
11 what we want to do is let you know that the guy you're doing
12 business with is a crook, that's the part I'm concerned with.

13 The order of attachment in this case governs securing
14 New York assets.

15 THE COURT: So then it may be a nonissue. But I would
16 not -- looking at page four of the requested confidentiality
17 order, I am not inclined to sign after the third line.

18 In other words, everything else in that paragraph up
19 to the point where it then talks about who can see the
20 material, I would probably strike. I haven't looked in great
21 detail at everything else to see what else is a problem or not.

22 MR. SMITH: The rest of the protective order, your
23 Honor, is --

24 THE COURT: Is standard.

25 MR. SMITH: Is standard.

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1 THE COURT: With that change, does that work,
2 Mr. Vandenberg?

3 MR. VANDENBERG: Does that include, your Honor, the
4 sentence, "All information designated as confidential under
5 this order shall not directly or indirectly be used, given, or
6 provided to any person or entity other than under the
7 circumstances..."

8 THE COURT: No. That sentence would be in because
9 that's still consistent. And, obviously, I would be doing this
10 without prejudice to seeing what happens as you have to issue
11 subpoenas or otherwise contact people.

12 MR. VANDENBERG: The first sentence in paragraph seven
13 which starts on the previous page at the bottom, "All
14 information designated as confidential under this order shall
15 be used only for the purpose of the claims and defenses in this
16 case and for no other purpose whatsoever," that's understood.
17 And that's what we do intend to use the information for. So if
18 that's the condition --

19 THE COURT: Then the question is -- you may be right
20 that the first full sentence on the top of page four is
21 unnecessary. But, I was planning on leaving in starting from
22 three lines above subparagraph (a), the sentence that says,
23 "Where a producing party has designated discovery material is
24 confidential," and then dealing with who can see it or
25 whatever.

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1 MR. VANDENBERG: Right.

2 Well, that's fine. I think -- our concern in dealing
3 with this protective order, and I think our concerns were
4 demonstrated in the response to the court-ordered discovery
5 which redacted much of the important information that was in
6 the bank records.

7 THE COURT: Our time is short.

8 Do both sides agree? And we can deal with the issue
9 further in the event you need to subpoena people as witnesses
10 or in terms of assets that --

11 (Pause).

12 That I am going to sign this with striking out from
13 the top of the page starting, "All information," until and then
14 leave in, "Where a producing party"?

15 Are there any other issues in the protective order, or
16 it's otherwise sign-able in this form?

17 MR. VANDENBERG: No other issues.

18 THE COURT: Good.

19 I am out of time. Is there anything else we need to
20 do today other than now that there is a confidentiality order,
21 the redactions in the prior material, that material should be
22 reproduced without redaction except for privilege?

23 MR. SMITH: I understand that, your Honor.

24 Do we have some sort of understanding about the
25 issuance of subpoenas to third parties?

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1 THE COURT: At the moment issuing a subpoena to a
2 third party would, if it's based on confidential information,
3 violate the use restrictions in the order. This is without
4 prejudice to seeing where things go. But I am always readily
5 available to deal with these issues and I don't think they're
6 going to be emergencies as such. So it doesn't mean I've
7 agreed with you, Mr. Smith. We're just putting a pin in it and
8 not directly dealing with it, although it's indirectly giving
9 you protection for now. But it's going to be without prejudice
10 under the case law. It's not that by signing this I am
11 preventing or creating a higher standard for the plaintiff to
12 move at the appropriate time if they want to issue some
13 financial source or whatever it may be.

14 MR. VANDENBERG: Understood.

15 MR. SMITH: Understood.

16 Given that I will produce in unredacted form the
17 documents.

18 THE COURT: How soon? By next Tuesday, Wednesday,
19 maybe?

20 MR. SMITH: I hope a week is okay because I'm all
21 jammed up for a week.

22 MR. VANDENBERG: I think your papers are due on Monday
23 the 26th and the dispositive motions and we'll wait until
24 Tuesday.

25 MR. SMITH: I have only two hands.

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1 THE COURT: It's Thanksgiving this week. I know you
2 were flooded out or whatever. So by no later than next Friday
3 but sooner if at all possible.

4 MR. VANDENBERG: Thank you.

5 THE COURT: When do you all want to come back to see
6 me? I status conference cases regularly. And if there is a
7 problem, as you can see in reading my rules, if we set
8 something for 30 days out and you have a problem in a week, try
9 work it out; but if not, contact me.

10 So what's your pleasure? Right after the first of the
11 year? Something sooner? Whatever you want.

12 MR. VANDENBERG: Perhaps because right after the first
13 of the year is when I'm going to be most jammed up we could do
14 something before the end of December.

15 THE COURT: Pick a date before Christmas.

16 MR. VANDENBERG: December 21. Friday.

17 THE COURT: How about December 19 or 20?

18 MR. VANDENBERG: Nineteen.

19 MR. SMITH: At -- any time is fine with me.

20 THE COURT: The 19th at 3:00.

21 If it turns out you don't need the conference because
22 everything is going smoothly, talk to each other and jointly
23 send in a letter or call my secretary. I will not cancel a
24 conference when a letter comes in from one that doesn't say
25 it's joined in by everybody because often the person who tries

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1 to cancel it is the person who is in default and is trying to
2 duck it.

3 So, consider the 636(c) issue and get back to me
4 jointly at the next conference on that.

5 I also suggest you all talk settlement. At some point
6 I'm going to be asking, when I have more time, to make sure you
7 really have talked settlement. And at some point there is a
8 good chance that I'll be bringing you and your clients in for a
9 full blown settlement conference. But at a minimum, at each
10 conference, I raise with the parties: Most cases settle, what
11 are you doing in that regard? And anyone who thinks that they
12 can't begin settlement talks because it shows weakness, this is
13 giving you that cover. You have to talk.

14 MR. SMITH: I was going to pick up on that. I'm
15 willing to sit down any time the court wants to. I mean I've
16 made requests to try and engage in those discussions. So far
17 haven't gotten anywhere. I think if the court scheduled a
18 settlement conference sooner rather than later we might get to
19 the chase here.

20 THE COURT: Well let's get some offers and responses
21 and we'll talk about it in December. And think about whether
22 you want to be in the court mediation program, whether you want
23 to go out to a private mediator, or whether you want to do it
24 in front of me or, if you consent to me as the trial judge, in
25 front of one of my colleagues. But as far as I'm concerned you

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1 only get one judicial settlement conference. So figure out
2 when you both think is the best time for that. If you do it
3 early and you don't settle, I'm probably not going to do it
4 again.

5 Thank you. I'm going to require both sides to
6 purchase the transcript which contains the court's orders. In
7 addition, you'll be getting a short form scheduling order via
8 ECF.

9 (Adjourned)